

STATE OF VERMONT
HUMAN SERVICES BOARD

In re)	Fair Hearing No. 15,652
)	
Appeal of)	
)	

INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) denying her application for certification to become a Legally Exempt Child Care (LECC) provider. The issue is whether the petitioner's past misdemeanor convictions for passing bad checks disqualify her from obtaining LECC certification under the pertinent regulations. The facts are not in dispute.

FINDINGS OF FACT

1. The petitioner was the subject of Fair Hearing No. 15,233, decided by the Board in March, 1998. That decision is incorporated by reference herein. In that decision the Board affirmed SRS's decision to revoke the petitioner's day care home registration. The petitioner did not appeal that decision.

2. Following that decision the petitioner continued to provide day care limited to not more than two families, which is permissible under state statutes.

3. In the summer of 1998, in order to comply with federal statutes relating to ANFC "welfare-to-work" requirements, the departments of Social Welfare (DSW) and

SRS instituted the LECC program whereby ANFC recipients who rely on unlicensed and unregistered providers of day care (i.e., providers who, because of the small number of children they care for, are "legally exempt" from licensing and registration requirements) can nonetheless qualify to receive day care subsidy payments.¹ Effective July 1, 1998, SRS promulgated regulations setting forth the requirements for these day care providers to qualify for a LECC certificate. These regulations were necessary to allow SRS and DSW to receive federal funding to provide child care assistance to ANFC recipients who use unlicensed and unregistered day care providers.²

4. The petitioner, who at times has been providing child care for one or two families on ANFC, applied for LECC certification on July 27, 1998. On August 26, 1998, SRS denied her application based on the petitioner's convictions in 1997 for two counts of misdemeanor passing a bad check (see Fair Hearing No. 15,233). SRS upheld that decision on October 26, 1998, following a Commissioner's Review hearing.

5. At the fair hearing in this matter, held on October 30, 1998, SRS explained that it was concerned about

¹As a general matter, child care subsidies are available only for children placed in licensed or registered day care facilities.

²The federal statute requires states to set minimal standards for health and safety, but does not specify particular requirements. See Public Law 103-227 (Pro-Children Act of 1994).

child safety and fraudulent billing in a program that entails minimal oversight and supervision, and that a recent conviction for a crime involving fraud raises sufficient doubts about the petitioner's ability to ensure children's safety and program integrity.

6. The petitioner, though she admits the convictions (see Fair Hearing No. 15,233), testified that providing day care is her "living", and that SRS's strict application of the regulations imposes a financial hardship on her.

7. SRS also stated at this hearing (a fact it did not bring up in Fair Hearing No. 15,233) that it had previously granted the petitioner a day care home registration from 1980 through 1997 although the petitioner had been convicted in 1975 of disorderly conduct, following an initial charge of assault. Therefore, SRS considers the petitioner's 1997 convictions for passing a bad check to be a "second strike" against her; and it does not feel that it should grant a "variance" to the petitioner to obtain certification despite this conviction.

ORDER

The Department's decision is affirmed.

REASONS

Section B.1. of the SRS LECC regulations includes the following provision:

The following persons may not be providers, be present in, or reside in the home of the Provider:

-a person found by the court to have committed fraud, a felony, or other offenses involving violence or unlawful sexual activity or other bodily injury to another person. . . .

The above regulation is identical in most crucial respects to the Day Care Registration Regulation that was at issue in Fair Hearing No. 15,233. In that case the Board concluded that the crime of passing bad checks constitutes "fraud" within the meaning of the regulation. (See 13 V.S.A. § 2022, which defines the crime of "Bad Checks", and which appears in Chapter 47 on "Frauds".) Therefore, it must be concluded that the petitioner's convictions in 1997 were within the meaning of the above regulation.

However, the LECC regulations (unlike the SRS regulations governing family day care registration) also contain the following provision at G.8.:

The SRS or DSW Commissioner, or his or her designee, may grant a variance to these requirements under unique and exceptional circumstances when literal application of a part of these requirements will result in an unnecessary hardship and the intent of the requirement can be achieved by other means.

SRS maintains that the "unnecessary hardship" referred to in the above provisions applies only to the recipients of ANFC who may be relying on a particular provider for day care that they might otherwise not be able to obtain. This

appears to be a reasonable interpretation because all day care providers could claim a financial hardship if they were no longer able to receive payments for their services. Therefore, it cannot be concluded that the potential loss of a day care provider's income, in and of itself, constitutes a "unique and exceptional circumstance" requiring the Department to consider a "variance" to the LECC requirements.

It also must be noted that the denial of the petitioner's certification for LECC does not mean that she cannot continue to provide child care for the children of one or two families in her home. It only means that if the parents of the children in her care are receiving ANFC, they cannot receive a subsidy through the LECC program to pay the petitioner for their children's care. As a practical matter, this might well mean that an ANFC parent will no longer be able to afford keeping her child in the petitioner's day care. However, the petitioner can still legally provide day care to children whose parents are privately paying her.

At the hearing the petitioner alleged that if she could not obtain LECC certification the parent of a child in her care would be harmed because her child would have difficulty adjusting if she had to switch day care providers. However, that parent was not at the hearing; and it has been explained to the petitioner that this parent has separate

appeal rights if she feels aggrieved by the Department's action.

Based on the wording of the regulations, it cannot be concluded that SRS is abusing its discretion under the law in denying the petitioner a variance at this time.

Therefore, the Board is bound to affirm the Department's decision. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 17.

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